No. 22637

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. DANIELSON, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellants, Trustees in Bankruptcy of the Los Angeles Trust Deed and Mortgage Exchange.

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The Government now apparently concedes that the carryback loss claim was property, but seeks to defeat the Trustees' rights to the property by asserting that it was excluded from the property transferred to the Trustees, or that, if included, it violated the anti-assignment statute. Neither defense is supported by the facts in this case, nor by statutory or case authority.

I.

The Farrell Carryback Loss Claims Were Not Excluded From the Assets Vested in the Trustees in Bankruptcy; the Order Regarding the Compromise of Controversy Is Not Ambiguous.

The Trustees' Application to Compromise and the annexed Farrell Affidavits included all possible categories of property and excluded only specifically de-

lineated properties and the specific category of "property which is exempt under any of the subdivisions of California Code of Civil Procedure §690." The Affidavit of the Farrells was the corner stone upon which the Application was founded, and the Order approving the compromise does not in any manner whatsoever reflect an intent by the court to modify the agreement of compromise. The Order approving compromise provided that "The application be and it hereby is granted." The balance of the language in the Order provided specific authority for consummation of the compromise of the controversy. As between the Farrells and the Trustees in Bankruptcy, the Farrell Affidavits unequivocally state that the excluded properties are limited to property exempt under the subdivisions of California Code of Civil Procedure §690 and to the specifically listed individual assets. The Farrells could not successfully contend as against the Trustees that the carryback loss was an excluded item; the Government has no special power or higher right which would permit it to so contend.

The Government's contention is based upon a strained construction of the Order approving compromise of controversy and would require this court to ignore the Application to Compromise and the annexed Farrell Affidavits, but California and federal courts have long held that several instruments relating to the same subject matter and executed as part of substantially one transaction must be construed together as one instrument. *Burnett v. Piercy,* 149 Cal. 178, 189, 86 Pac. 603 (1906); *Harm v. Frasher,* 181 Cal. App. 2d 405, 413, 5 Cal. Rptr. 367 (1960); *Basile v. California Packing Corp.,* 25 F. 2d 576, 577 (9th Cir. 1928); California Civil Code §1642.

Further, the Government would require that the reference to California Code of Civil Procedure §690 in the Affidavit be deemed meaningless or inoperative. That, however, is contrary to the accepted rules of construction as set forth, for example, in *Hol-Gar Mfg. Corp. v. United States,* 351 F. 2d 972, 979 (Ct. Cl. 1965) where the court stated:

> "In construing . . . [the terms of an instrument] the intention of the parties must be gathered from the whole instrument. . . . Also, an interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible." (Emphasis added).

It is only when the interpretation urged by the Government is adopted that a contradiction or uncertainty appears. It is elementary that an interpretation of an instrument which leads to contradiction should not be favored. Provisions should be interpreted as coordinate and not contradictory. *Union Management Corp. v. United States, supra,* at 806.

The Government contends that whenever an instrument is ambiguous, it must be construed most strongly against the party who drafted it. This rule is to be utilized only where the true intent of the parties cannot be determined either from the instrument itself or from extrinsic evidence. See *Silva v. Meyer,* 129 Cal. App. 2d 15, 18-19, 276 P. 2d 174 (1954). Here, the application of this rule is unnecessary since any alleged ambiguity in the instruments is cured by reading the

ceding year. The corporation is, in effect, allowed to take a tentative credit against its unpaid tax for the preceding year in the amount of the carryback refund which it expects to be entitled to at the end of the current year.

Thus, an operating loss carryback claim is transferrable property prior to the end of the taxable year; the Farrell carryback loss claims existed before June 27, 1962, and the Order of November 21, 1962 effectively transferred the Farrell carryback loss claims to the Trustees.

III.

The Farrell Carryback Loss Claims Were Transferred by Operation of Law.

A transfer effectuated by order of the bankruptcy court is a transfer by operation of law and outside the scope of the Anti-assignment statute, 31 U.S.C. §203, regardless whether the assignor would have voluntarily made the transfer. In *In re Pottasch Bros. Co.,* 11 F. Supp. 272 (S.D.N.Y. 1935) aff'd 79 F. 2d 613 (2nd Cir. 1935), a creditor of a bankrupt filed a proof of claim as a partly secured claim. The trustee, desiring to compromise the claim, agreed to transfer to the creditor all outstanding receivables and claims of the bankrupt. Among these claims was a claim against the United States for excess duties paid, the existence of which was unknown to the trustee. The bankruptcy court ordered that the transfer and compromise be approved. Thereafter, the claims against the United States were approved and the creditor brought this action to obtain the money received by the trustee from

the United States. In allowing the claim, the District Court stated:

> "The trustee suggests that a transfer of the claims against the United States pursuant to order of the court would be void. *A transfer by a trustee in bankruptcy of a bankrupt's claim against the United States, pursuant to order of the bankruptcy court, is regarded as a transfer by operation of law and not in violation of the act forbidding assignments of such claims.* Such a transfer had no tendency to promote traffic in claims against the United States, and is not within the spirit of the statute." (11 F. Supp. at 277) (Emphasis added).

See also *Western Pacific R. Co. v. United States,* 268 U.S. 271 (1925) and *In re Gerstenzang,* 5 F. Supp. 904 (S.D.N.Y. 1933), where it was held that the provisions of 31 U.S.C. §203 did not affect voluntary sales of a bankrupt's property by its trustee, since such sales were approved by court order and were thus transfers by operation of law.

The Government's reliance on *Kinney-Lindstrom Foundation, Inc. v. United States,* 186 F. Supp. 133 (N.D. Iowa 1960), is misguided. That case involved an order of a state probate court rather than a federal bankruptcy court. In *Kinney-Lindstrom* the assignment was from the estate to the residuary beneficiary of the estate, and the application for the order authorizing the assignment expressly stated that the beneficiary would eventually receive the claim without the assignment. Here, however, there was no relationship between the Farrells and the Trustees apart from the fact that the Trustees had brought an action against the Farrells. The assignment by the

Farrells was made under duress; that is, if there were no assignment, the Trustees would proceed with their action. It is thus clear that the facts of *Kinney-Lindstrom* are not at all parallel to the facts of the instant case.

Furthermore, it is respectfully submitted that the decision in *Kinney-Lindstrom* is incorrect. The court there held, without citation of authority, that a transfer by an executrix, pursuant to court order was a voluntary transfer. Such a holding cannot be justified. If a transfer is not effective without a court order approving it, it cannot be said to be voluntary, for to so hold would stretch the meaning of "voluntary" beyond recognition.

IV.

The Government Is Estopped to Deny the Trustees' Right to the Farrell Carryback Loss Claims.

The Government, besides being a judgment creditor of David Farrell, had filed a claim in the Los Angeles Trust Deed and Mortgage Exchange bankruptcy proceedings. As a creditor, the Government received notice of the Trustees' Application for authority to compromise their controversy with the Farrells. The Government, knowing that the Farrells had filed claims for tax refunds based upon operating loss carrybacks, and knowing that the language of the proposed compromise would transfer the Farrell carryback loss claims to the Trustees, nevertheless made no objection to the Application, did not appear at the hearing on the Application and for a period of approximately five years, acquiesced in the provisions of the Order compromising the controversy.

The proper time for the Government to voice its objections was at the hearing on the Trustees' Application; the Government is now estopped to deny the Trustees' right to the refund resulting from the Farrell carryback loss claim.

Conclusion.

A carryback loss claim is a transferrable property right that exists prior to the end of the taxable year in which it arises. The Farrell carryback loss claims were not specifically reserved to the Farrells, nor were they included in the exempt property claimed by the Farrells. A transfer pursuant to order of the bankrupt court is outside of the language and intent of the Anti-assignment of claims statute. The Farrell carryback loss claims therefore vested in the Trustees by the express terms of the Order of November 21, 1962, compromising a controversy between the Farrells and the Trustees.

Wherefore, appellants, Trustees in Bankruptcy of Los Angeles Trust Deed and Mortgage Exchange respectfully request that the Order of the United States District Court for the Central District of California granting appellee's Motion for Order transferring monies be reversed.

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